No. 06-566

In The
Supreme Court of the United States

EDO GEORGE MBABA and PATIENCE MBABA,

Petitioners,

v.

SOCIETE AIR FRANCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Issue 1: Whether the Warsaw Convention precludes Petitioners' claims.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

(1) Respondent Société Air France ("Air France") was previously at all material times an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. § 1603, because a majority of its shares have been at all material times owned by the Government of France.

(2) Respondent Air France's subsidiaries and known affiliates are:

Société Air France (a/k/a Air France)
Air Charter
Groupe Jet Tours
Go Voyages
Groupe Servair
Air Inter
EuroBerlin
Ecole de Pilotage Amaury de la Grange
REVIMA
CRMA
Esterel
Sodetair
Societe Immobiliere Aeroportuaire
GIE Amadeus France
SODEXI
Groupe Air France Finance
FINACTA
KLM

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SUMMARY OF REASONS TO DENY THE PETITION

Petitioners have repeatedly opposed Respondent's settlement offers, removal of action to federal court and prayer for protection under the Warsaw Convention in the hopes of showing that an airline industry insider[1] was defrauded as to a standard term in a uniform contract of international air carriage requiring passengers to pay all applicable tariff and tax charges upon each instance of checking in baggage.

First, Petitioners attempt to show a split of authority among Circuit Courts, most notably the Seventh Circuit's ruling in *Wolgel* that non-performance of a contract of carriage is not subject to the Convention. In this case, however, Petitioners bring a complaint of substandard performance and a dispute over uniform contract of carriage terms. For this Honorable Court to even entertain review of this case would open the door to subjecting international air carriers to innumerable interpretations of uniform contract provisions. Granting review could also undo this Honorable Court's jurisprudence surrounding the Convention in future cases by the mere allegation of a misrepresentation at the baggage counter. Moreover, Petitioners suggest that their entitlement to state law recovery arises from the alleged absence of a remedy under the Convention. In fact, Petitioners could have, but chose not to, pursue delay damages. Petitioners also refer to decisions of other Circuits in hopes of showing a conflict with the Fifth Circuit's decision in this case. The cases from other Circuits, however, involve claims arising either

[1] *See* Petitioners' Appendix A pg. 2, and B pg. 12.

away from the airport or otherwise outside the normal and proper course of air transport. Other cases cited by Petitioners have been abrogated by this Honorable Court. Petitioners also attempt, "in cart precedes horse fashion," to persuade this Honorable Court to find a split of authority generated by a Texas appeals court decision. That is, Petitioners ask this Honorable Court to consider that Texas law might prohibit an international treaty from precluding recovery under Texas law. Consequently, no split of authority exists as to the question presented to this Honorable Court.

Second, Petitioners criticize the Fifth Circuit's reference to Montreal Protocol No. 4. They fail to explain however, how their criticism requires review by this Honorable Court even if it were accurate.

Third, Petitioners criticize the Fifth Circuit's interpretation of this Honorable Court's decision in *Tseng*. Petitioners would read *Tseng* to mean that the absence of a Warsaw Convention remedy is their ticket to state law recovery, because the substantive scope of the Convention means the collection of causes of action and remedies provided therein. Petitioners could have chosen, but decided otherwise, to pursue recovery of their damages under the delay damages remedy provided by the Convention. Petitioners overlook this Honorable Court's description of the substantive scope of the Convention as being "only and exclusively, the airline's liability for passenger injuries occurring 'on board the aircraft or in the course of any of the operations of embarking or disembarking.'"[2] Because it is undisputed that Petitioners' complaint arose

[2] *Tseng*, 525 U.S. at 171-72.

during the ordinary temporal and physical course of those activities, *Tseng* was properly understood and applied by the lower courts in this case.

Finally, Petitioners refer to the *Sidhu* decision by the British House of Lords in hopes of showing inconsistency between American Courts and those in the United Kingdom in the interpretation of the Warsaw Convention. Petitioners rely only on dicta from the *Sidhu* decision. In *Sidhu*, the British House of Lords held that the Convention precluded claims not specifically addressed by the Convention due to the intent of uniformity. That result and its reasoning is virtually identical to the *Tseng* decision and the decisions of the lower courts in this case.

STATEMENT OF THE CASE

Société Air France ("Air France") makes the following corrections and additions to Petitioners' preamble summary. Petitioners were not charged $4,048.66 to transport excess baggage from Texas to Nigeria. Rather, that charge was for the transport of excess baggage from France to Nigeria, and an offered settlement for figures in that amount and above has been repeatedly opposed by Petitioners. Petitioners also opposed the removal of this suit to federal court, although it was against a foreign state under 28 U.S.C. § 1603 and premised on a contract of international air carriage. Finally, Petitioners opposed the application of the Warsaw Convention to their state law claims for mental anguish, exemplary damages and other extra-contractual damages. The Honorable Nancy Atlas and the Fifth Circuit Court of Appeals, however, have rejected Petitioners' opposition.

A. Nature of the Case

Respondent agrees with Petitioners' summary of the nature of the case in part and disagrees in part. It is undisputed that Petitioners' claims are based exclusively on Texas law (e.g., statutory attorney's fees and exemplary damages) and that they seek no recovery under federal law, such as the Warsaw Convention as modified by Montreal Protocol No. 4. Consequently, the exclusive remedy provisions of the Warsaw Convention bar Petitioners' claims. Furthermore, Air France's tariffs and conditions of carriage are binding on Petitioners and bar their claims as a matter of law. Finally, the summary judgment evidence contradicts Petitioners' claims and includes no evidence to raise a material fact issue because the applicable tariffs and conditions of carriage are binding on the appellants and they are deemed to have known them.

Petitioners correctly describe George Mbaba's travel arrangements in general, but neglect to mention that his ticket was for travel on an open stand-by basis. Petitioners incorrectly state that Air France has not disputed that George Mbaba was told that his "bags would be burned." Air France specifically objected to the hearsay statement of an unidentified person, as well as other hearsay statements in Mr. Mbaba's affidavit. The lower courts have found that statement to be irrelevant.

B. Proceedings Below

Respondent agrees with Petitioners' summary of the proceedings below in part and disagrees in part. Petitioners continue to concede that this matter arose in the course of international carriage by air.

Petitioners do not seek merely the benefit of their bargain. Instead, Petitioners seek an assortment of damages under the Texas Deceptive Trade Practices Act, including attorney's fees, mental anguish, and statutory trebling of damages, as well as exemplary damages.

Petitioners correctly note the outcome in the proceedings so far. They read too broadly, however, the rulings of the lower courts. Those courts have not ruled that the Warsaw "Convention precludes passengers from bringing action of any kind under local law when they cannot establish air carrier liability under the Convention."[3] Instead, those courts have ruled that the Convention's preclusive effect applies to claims arising in the course of international air carriage. Claims arising outside of that course (e.g., an auto accident in the airport parking lot, a slip and fall in the airport elevator or food court) may not be precluded by the Convention.

REASONS FOR DENYING THE PETITION

I. There Is No Inter- or Intra-Circuit Split on the Question Presented

Petitioners correctly note that this Honorable Court has granted review several times since 1985 for cases involving application of the Warsaw Convention[4] involving

[3] Emphasis omitted. *See* Petitioners' Petition for Writ of Certiorari, pg. 4.

[4] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, *note following* 49 U.S.C. § 40105.

death and other similarly important matters.[5] Respondent finds no instance, however, in which this Honorable Court has ever dignified a request for review of a case in which an airline industry insider claimed to have been misled by an alleged statement of an unidentified baggage agent in direct contradiction of the uniform conditions of carriage and thereby demanded recovery for mental anguish, exemplary damages, attorney's fees and state law trebling of damages pursuant to a state law consumer protection statute. Far from helping to resolve a divergence of reasoning among the Circuit Courts, any ruling in this case would add confusion without clarification.

A. Any Split of Authority Between the Fifth and Seventh Circuits is Irrelevant to the Question Presented

Petitioners present the *Wolgel* decision of the Seventh Circuit[6] in hopes of showing a conflict with the decision of the Fifth Circuit in this case. The *Wolgel* decision predated Montreal Protocol No. 4.[7] In *Wolgel*, passengers were bumped from their flight. The Seventh Circuit Court of

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[5] *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (death); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) (concealed molestation); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996) (double fatality); *Eastern Air Lines v. Floyd*, 499 U.S. 530 (1991) (mental anguish sans physical injury from near death experience); *Chan v. Korean Air Lines*, 490 U.S. 122 (1989) (269 passengers en route to Korea killed by Soviet military); and *Air France v. Saks*, 470 U.S. 392 (1985) (permanent deafness from improper pressurization).

[6] *Wolgel v. Mexicana Airlines*, 821 F.2d 442, 444 (7th Cir. 1987), *cert. denied*, 484 U.S. 927 (1987).

[7] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air. *See* Cong. Rec. S11059-02 (Sep. 28, 1998).

Appeals held that bumping in that case amounted to non-performance of the contract of carriage. That Court further reasoned that non-performance claims fall outside of the Warsaw Convention, because inclusion of recovery for non-performance of a contract in the Convention was considered during the drafting of Article 21 of the Convention, but ultimately decided against and left out of the Convention. *Id.* at 444.

Petitioners' search for support in *Wolgel* fails for several reasons. Petitioners' claim does not involve *non-performance* of a contract. Instead, their claim is that Air France's contract performance fell short of what Mr. Mbaba believed was promised, because Paris tariff and tax charges were applied to his excess baggage when he checked them in at the Paris airport.[8] In bumping cases, a passenger's departure is confirmed in writing as an express term in the air carriage contract. An air carrier's failure to comply with that term can be considered non-performance. In this case, however, the uniform contract of carriage expressly states that carriage of baggage is subject to various terms including application of tariffs, taxes and related amounts upon check-in of baggage. Petitioners complain because Air France applied these charges when Mr. Mbaba checked in his excess baggage at the Charles De Gaulle Airport in Paris, France. To be sure, Petitioners' claim amounts to a dispute over the terms of the contract, *not* non-performance. For this Honorable

[8] Petitioners suggest that they have no remedy under the Convention. The Convention, however, provides for delay damages under Article 19. Petitioners might have pursued recovery under Article 19 as their damages were purportedly necessary to avoid further delay by Air France's alleged substandard performance. Petitioners decided against pursuing such recovery in favor of purely state law remedies.

Court to even entertain allowing a cause of action outside the Convention over the terms of a contract of carriage would open the door to subjecting international air carriers to as many interpretations of their uniform contracts of carriage, and attendant remedies, as there are destinations in their travel offerings. Moreover, different juries in a given destination might also add even more different interpretations and remedies.

In order to accept Petitioners' argument that Air France either did not perform or even incompletely performed the contract of carriage, this Honorable Court would have to accept absurd assumptions and thereby undermine its jurisprudence surrounding the Warsaw Convention. In order for this case to be considered a case of non-performance, or even substandard performance,[9] this Honorable Court must either (1) ignore the uniform terms of the contract of carriage, or (2) accept the premise that the express terms of a contract of carriage, and indeed the application of taxes and tariffs across the globe, can be revoked by an alleged oral statement made by a baggage agent, even though the terms of the uniform contract of carriage also prohibit such revocation. Air France's uniform contract of carriage specifically states that passengers are responsible for additional tariff and tax charges that are applicable whenever baggage is checked in. Because those terms are in evidence and not controverted, review by this Honorable Court would be an exercise in futility.

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[9] Substandard performance would be irrelevant to the *Wolgel* decision, absent an expansion of the reasoning therein.

B. Any Split of Authority Between the Fifth Circuit and the First, Second, Third, Ninth or Eleventh Circuits is Irrelevant to the Question Presented.

Anticipating the failure of the *Wolgel* decision to show a split of authority related to their claim, Petitioners resort to summary references to carefully tailored quotes from decisions of other Circuits. Those decisions do not help Petitioners because they are unrelated to this case and demonstrate no meaningful split of authority among Circuit Courts.

1. First Circuit.

Petitioners suggest that *Hernandez v. Air France*[10] allows relevant "remedies of local law." In that case, terrorists removed their luggage from a conveyor belt in the baggage claim area of the terminal, produced submachine guns and opened fire upon persons in the baggage claim area.[11] That court reached its decision against applying the Convention after noting that passengers and non-passengers alike are exposed to the type of harm that was involved in that case, so that it would be improper to allow passengers a strict liability cause of action under the Convention while non-passengers have no such right for injuries in the baggage claim area.[12] In our case, Mr. Mbaba admits that his alleged damages occurred at the baggage counters in the course of his checking in excess

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[10] 545 F.2d 279, 284 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

[11] *Id.* at 281.

[12] *Id.* at 284.

baggage. Unlike in *Hernandez*, only international air carriage customers like Petitioners are allowed to check in excess baggage and purchase carriage of same. For those reasons, *Hernandez* does not conflict with the Fifth Circuit's decision.

2. Ninth and Second Circuits.

Petitioners also cite the *Read-Rite*[13] and *Victoria Sales*[14] decisions in hopes of showing a conflict with the Fifth Circuit. Both of those decisions involve cargo losses occasioned away from the airport. By contrast, Petitioners complain of episodes at the counters, of baggage agents in Texas and later Paris shortly before departure. In *Read-Rite*, the Ninth Circuit upheld summary judgment denying a plaintiff's claim for a crate broken before transport from England to San Francisco.[15] At a facility "near, not within the perimeter of, Heathrow Airport . . . a ground handling agent accidentally damaged one of the crates and the machinery within."[16] The District Court held that the Convention did not apply "because Article 18(3) of the Convention states that it 'shall not extend to any transportation by land, by sea or by river performed outside an airport.'"[17] The Circuit Court "agree[d] with the district court that, by the plain terms of Article 18, the Warsaw Convention does not apply," because "the goods in this case

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[13] *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190 (9th Cir. 1999).

[14] *Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705, 707 (2d Cir. 1990).

[15] *Read-Rite*, *supra* at 1193.

[16] *Id.*

[17] *Id.* at 1194.

were destroyed during ground transportation that was close to – but clearly outside – London's Heathrow Airport."[18] In *Victoria Sales*, the Second Circuit held that the scope of the Warsaw Convention did not include damage due to cargo that was lost at the carrier's warehouse one-quarter mile outside the airport.[19] Because those decisions involved claims arising outside the temporal and physical scope of the Convention, they have no application to this case, so that those decisions do not conflict with the Fifth Circuit's decision.

3. Third and Eleventh Circuits.

Petitioners cite the *Abramson*[20] and *Floyd*[21] decisions in hopes of showing a conflict with the Fifth Circuit. This is not the first time that *Abramson* has been presented to this Honorable Court in an effort to criticize the Fifth Circuit's interpretation of the Convention. This Honorable Court has, however, abrogated *Abramson* in favor of the accurate respect for the intent of uniformity in the Convention found in the Fifth Circuit's reading of the Convention.[22] Petitioners apparently admit that *Tseng* makes *Abramson* inapplicable except that its reasoning might be applied to non-injury cases. *Abramson*, however, was an injury case, specifically involving aggravation of a hernia. Moreover, this Honorable Court's ruling in *Tseng* was

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[18] *Id.*

[19] *Victoria Sales*, *supra* at 707-08.

[20] *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 134 (3d Cir. 1984).

[21] *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1481 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991).

[22] *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 161 n.3 (1999).

driven by the interest of uniformity. While jurisdictions may differ somewhat on claims and remedies available for injuries, they differ vastly on the interpretations, claims and remedies available for contract disputes and consumer fraud (or *caveat emptor*) theories of liability. To suggest that *Tseng*'s abrogation of *Abramson* still allows for local remedies in disputes over the terms of uniform contracts of international air carriage is analogous to declaring the absence of an elephant in a room where no one has ever confronted the pachyderm, and likely for good reason. The elephantine interest of uniformity in the regulation of international air carriage does not need to be repeated by this Honorable Court to disgruntled passengers alleging misrepresentations at the baggage counter. This Honorable Court similarly explained that its ruling in *Tseng* encompassed the *Floyd* decision.[23] For those reasons, those decisions do not present an unresolved conflict with the Fifth Circuit's decision in this case.

4. Texas Appeals Court.

Petitioners cite *Imtiaz v. Emery Airfreight*[24] to suggest that a Texas appeals court decision presents a split of authority within the Fifth Circuit, although it is not a decisions from a State court of last resort, since no appeal to the Texas Supreme Court was pursued. *Imtiaz* was a cargo case in which the Texas appeals court relied on the 1982 published decision of a U.S. District Court in Kansas.[25] The *Imtiaz* decision pre-dated *Tseng*, which resolves

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[23] *Id.* at 162.

[24] 728 S.W.2d 897 (Tex.App. – Houston [1st Dist.] 1987, no writ).

[25] *Hill v. United Airlines*, 550 F.Supp. 1048 (D.Kan. 1982).

the issue in the case before this Honorable Court in this petition for review. Moreover, reference to a Texas (or any other State) appeals court decision begs the question of whether Texas law is available to Petitioners. Any line that may be drawn by a Texas court for purposes of determining the scope of the Convention is, for purposes of this Honorable Court, no different from the Texas Deceptive Trade Practices Act (and Texas common law of Contracts and Fraud) itself. The line that has been drawn in this case by the Fifth Circuit is not only outside the hands of Texas (and other State) courts, but is necessarily so as indicated by the reasoning in *Tseng*. To be sure, for a Texas (or other State) court to declare that the Convention does not apply so as to prevent a state law cause of action begs the question whether state law causes of action are barred by the Convention. If they are so barred, a State court's ruling is of no consequence. For those reasons, the *Imtiaz* decision provides no basis for review by this Honorable Court.

5. Second Circuit.

Petitioners cite *King v. American Airlines, Inc.*[26] to mention a distinction they perceive whereby "in the course of embarkation" is separate from "in the course of the international carriage of passengers and baggage." The court in *King*, however, noted

> the Warsaw Convention created a comprehensive liability system to serve as the exclusive mechanism for remedying injuries suffered *in the course of the "international transportation of persons,*

[26] 284 F.3d 352, 355 (2d Cir. 2002).

> *baggage, or goods performed by aircraft.*"[27] (Emphasis added).

Petitioners fail to show any difference or support for their perceived distinction. Moreover, Petitioners fail to describe how their claims fall outside of even the course of embarkation, since, like the *King* plaintiffs, Mr. Mbaba's alleged damage occurred in the process of his embarkation at the baggage counter.

In summary, granting review of this case will not resolve a divergence of authority among the Circuit Courts, but will certainly generate confusion. Rarely are Convention plaintiffs industry insiders who are traveling on an open stand-by basis, as in this case. Rarely do passengers who allege to have been misled about air travel claim that an agent orally revoked the uniform express condition that tariffs, taxes and related charges are applicable each time baggage is checked in, as in this case. Moreover, if unsatisfactory performance of a contract or misrepresentation of the terms of a contract of carriage is not subject to the Convention, then perhaps the entirety of this Honorable Court's jurisprudence on the Warsaw Convention can be undone by the mere allegation in future cases of unsatisfactory performance or misrepresentations at the check-in counter.

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[27] *Id.* at 356-57.

C. The Lower Courts Do Not Improperly Rely on Montreal Protocol No. 4's Change in Article 24

Petitioners fail to show any conflict in the Fifth Circuit's consideration of Montreal Protocol No. 4 as compared to other Circuits or a state court of last resort, or that such consideration otherwise merits review by this Honorable Court.

D. The Lower Courts Properly Read and Applied *Tseng*

Petitioners discuss passages from the *Tseng* decision in search of a conflict with the Fifth Circuit's decision in this case. As explained above, if uniformity of personal injury actions and remedies among cases of international carriage by air requires application of the Convention to those cases, then *a fortiori* uniformity in disputes over terms in uniform contracts of international air carriage requires application of the Convention in those cases because of the greater interest in uniformity in the latter. There is no dispute that Mr. Mbaba's alleged damage arose within the temporal and physical scope of the Convention, that is in the course of international transportation of persons, baggage, or goods performed by aircraft. For those reasons, the Fifth Circuit has not reached a decision in conflict with this Honorable Court.

II. The Decision Below Comports With the View of the Court of Last Resort of a Sister Signatory Referenced by Petitioners

In support of their claim of inconsistency with a sister signatory, Petitioners refer to a decision by the British House of Lords, *Sidhu v. British Airways plc*, [1997] 1 All E.R. 193.[28] Stating the ultimate opinion and decision accepted by all of the other reporting Lords, Lord Hope of Craighead explained the issue in that appeal as follows:

> So the stark issue which is before us in this appeal is whether a passenger who has sustained damage in the course of international carriage by air due to the fault of the carrier, but who has no claim against the carrier under article 17 of the Convention, is left without a remedy. *Id.* at 441.

Lord Hope later remarked, as mentioned by Petitioners, on the significance of the phrase "Unification of Certain Rules" in the title of the convention. *Id.* at 444. After summarizing decisions by this Honorable Court as well as decisions from other countries, Lord Hope concluded at the end of the opinion:

> Were remedies outside the Convention to become available, it would encourage litigation in other cases to restrict its application still further in the hope of obtaining a better remedy, against which the carrier would have no protection under the contract. I am in no doubt that the Convention was designed to eliminate these difficulties. I see no escape from the conclusion that, where the

[28] This decision also appears to be cited as [1997] 2 W.L.R. 26.

> Convention has not provided a remedy, no remedy is available. *Id.* at 454.

As with the remainder of that decision, those direct quotes make it clear that English courts agree with the reasoning of the Fifth Circuit that the absence of a Warsaw Convention remedy is no ticket to extra-Convention (or state law) recovery. Since the *Sidhu* decision is consistent with the decision on appeal before this Honorable Court, there is no basis for review of this case by this Honorable Court.

CONCLUSION

In summary, the U.S. District Judge Nancy Atlas and the Fifth Circuit Court of Appeals have correctly applied the *Tseng* decision of this Honorable Court to resolve this case. Far from necessary, review by this Honorable Court would likely undermine the jurisprudence that exists to maintain the uniformity intent of the Convention, in light of the unusual facts of this case.

PRAYER

For those reasons, Respondent prays that Petitioners' petition for a writ of certiorari be denied.

Respectfully submitted,

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